LIBRARY
SUPREME COURT

Office-Supreme Court, U.S.
FILED
AUG 13 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 16

ELIZABETH SIMONSON KING, Executrix of the Estate of GEORGE STEWART KING, Deceased, and NATIONAL SURETY CORP.,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS.

DAVID S. BATE,
Attorney for Petitioner,
Elizabeth Simonson King.
31 Park Street,
Montclair, New Jersey.

PAUL A. MURPHY,
Attorney for Petitioner,
National Surety Corp.,
1180 Raymond Boulevard,
Newark 2, New Jersey.

Of Counsel:
BOYD, DODD, KEER AND BOOTH,
CRUMMY, GIBBONS AND O'NEILL.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.—MArket 3-4994

TABLE OF CONTENTS.

	PAGE
OPINIONS BELOW	1
JURISDICTION OF THIS COURT	2
THE STATUTES INVOLVED	2
QUESTION PRESENTED	4
STATEMENT OF THE CASE	4
1. The Facts	4
2. The Proceedings Below	7
SUMMARY OF ARGUMENT	8
ARGUMENT:	
I. Rev. Stat. Sec. 3466, 31 U. S. C. Sec. 191 and Rev. Stat. Sec. 3467, 31 U. S. C. Sec. 192 do not apply to the case at bar since the debtor corporation was not insolvent	10
II. Rev. Stat. Sec. 3466, 31 U. S. C. Sec. 191, and Rev. Stat. Sec. 3467, 31 U. S. C. Sec. 192, do not apply to the case at bar since the debtor corporation had not made an assignment of its assets, or committed an act of bankruptcy	13
III. 31 U. S. C. Sec. 192 does not apply to the case at bar because the distributing agent, King, never received all of the debtor corporation's assets	16
IV. A distributing agent should not be held liable under Rev. Stat. Sec. 3466, 31 U. S. C. Sec. 191, and Rev. Stat. Sec. 3467, 31 U. S. C. Sec. 192,	

PAGE

where he followed explicitly the orders of the court in his distribution 18

CONCLUSION 23

CASES CITED.

Beaston v. *Farmers Bank*, 12 Pet. 102 (1838)..... 14, 17

Bramwell v. *United States Fidelity & G. Co.*, 269 U. S. 483 (1926) 14

Conard v. *Atlantic Ins. Co.*, 1 Pet. 386 (1828)..... 11, 17

Empire Shoe Corporation, In re, 16 F. Supp. 713 (D. N. Y. 1936) 22

J. B. Pollack Co., Inc., In re, 86 F. 2d 99 (2d Cir. 1936) 19

Manhattan Rubber Mfg. Co. v. *Lucey Mfg. Corp.*, 26 F. 2d 839 (D. N. Y. 1928) 17

Prince v. *Bartlett*, 8 Cranch 431 (1814)..... 11

Seeley Tube and Box Company, In re, 120 F. Supp. 269 (D. N. J. 1954) 7, 13

Seeley Tube and Box Company, In re, 219 F. 2d 389 (3d Cir. 1955); cert. denied, 350 U. S. 821 (1955) 7, 13

Smith v. *United States*, 113 F. Supp. 702 (D. Hawaii 1953) 17

Thelusson v. *Smith*, 2 Wheat. 396 (1817)..... 11

United States v. *Crocker*, 194 F. Supp. 860 (D. Nev. 1961) 19

United States v. *Crocker*, 313 F. 2nd 946 (9th Cir. 1963) 9, 19

United States v. *Hooe*, 3 Cranch 73 (1805)..... 14, 15, 16, 17

United States v. *King*, 208 F. Supp. 697 (D. N. J. 1962); rev'd 322 F. 2d 317; cert. gr. 375 U. S. 983 8

PAGE

United States v. *Lutz*, 295 F. 2nd 736 (5th Cir. 1961) 11, 12
United States v. *Oklahoma*, 261 U. S. 253 (1923).... 12, 14
United States v. *Press Wireless*, 187 F. 2d 294 (2d. Cir. 1951) 12
United States v. *Sachs*, 217 F. Supp. 545 (D. Md. 1963) 20
United States v. *Stephens*, 208 F. 2nd 105 (5th Cir. 1953) 9, 18, 19
United States v. *Western Union Telegraph Co.*, 50 F. 2d 102 (2d Cir. 1931) 11
Weiss v. *Fleetwood Bank*, 261 App. Div. 572, 26 N. Y. S. 2d 583 (App. Div. 1941) 15

STATUTES CITED.

Act of March 2, 1799, Ch. 22, Sec. 65, 1 Stat. 676.... 10, 11
Act of March 3, 1797, Ch. 20, Sec. 5, 1 Stat. 515..... 10,16
11 U. S. C. Sec. 104 2
11 U. S. C. Sec. 701 et seq. 4, 14, 20
11 U. S. C. Sec. 737 et seq. 2, 4, 5, 20
28 U. S. C. Sec. 1254(1) 2
28 U. S. C. Sec. 1345 4
31 U. S. C. Sec. 191 (Rev. Stat. sec. 3466) ..3, 4, 7, 8, 10, 12, 13, 15, 16, 18
31 U. S. C. Sec. 192 (Rev. Stat. sec. 3467)..3, 4, 7, 8, 9, 10 12, 13, 16, 17, 18, 19

Other Authorities Cited.

	PAGE
Annot. 169 A. L. R. 626 (1946)	12
9 Appleman Insurance Law and Practice, Sec. 5445, p. 297, and Sec. 5479, p. 376 (1943)	22
9 Remington, Bankruptcy Law, Sec. 3598, p. 238 (6th Ed. 1955)	22
Stearns, Suretyship, Sec. 9.27, p. 341 (5th Ed. 1951)	22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 654.

ELIZABETH SIMONSON KING, Executrix of the Estate of GEORGE STEWART KING, Deceased, and NATIONAL SURETY CORP.,

Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the United States District Court for the District of New Jersey (R. 12-23) is reported at 208 F. Supp. 697. The opinion of the United States Court of Appeals for the Third Circuit (R. 30-40) is reported at 322 F. 2d 317.

Jurisdiction of this Court.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 13, 1963 (R. 40-41).

The petition for writ of certiorari was granted on January 13, 1964 (R. 42), 375 U. S. 983 (1964).

The Statutes Involved.

Sec. 64, Ch. VII, of the Bankruptcy Act, 11 U. S. C. sec. 104, provides in pertinent part:

> "(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (5) debts owing to any person, including the United States of America, who by the laws of the United States of America is entitled to priority, * * *"

Sec. 337, Ch. XI, of the Bankruptcy Act, 11 U. S. C. sec. 737, provides in pertinent part:

> "*Same; conduci and business after acceptance of arrangement.*
>
> At such meeting, or in any adjournment thereof, the judge or referee shall, after the acceptance of the arrangement—
>
> (1) appoint the receiver or trustee, if any, or otherwise appoint some other person, to receive and distribute, subject to the control of the court, the moneys and consideration, if any, to be deposited

by the debtor; require such person to give bond with surety to be approved by the court in such amount as the court shall fix; and fix the amount or rate of such person's compensation not in excess of the compensation allowable to a receiver under this title."

Rev. Stat. sec. 3466, 31 U. S. C. sec. 191 and Rev. Stat. sec. 3467, 31 U. S. C. sec. 192 provide:

"Section 191. *Priority Established.*

Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

"Section 192. *Liability of Fiduciaries.*

Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

Question Presented.

May a distributing agent appointed to distribute some of the funds of the debtor corporation under a plan of arrangement in Chapter XI of the Bankruptcy Act, 11 U. S. C. sec. 737, or his surety, be held liable under the provisions of Rev. Stat. sec. 3466, 31 U. S. C. sec. 191 and Rev. Stat. sec. 3467, 31 U. S. C. sec. 192, for the payment of a claim of the United States of America where the said agent, pursuant to the order of the court, has disbursed all of the funds coming into his possession?

Statement of the Case.

This suit was brought by the United States of America against the distributing agent in bankruptcy of a corporation, and his surety, to subject the agent to personal liability pursuant to Rev. Stat. sec. 3466, 31 U. S. C. sec. 192, for his alleged failure to honor the government's debt priority under Rev. Stat. sec. 3467, 31 U. S. C. sec. 191. The United States District Court for the District of New Jersey had jurisdiction of the subject matter under 28 U. S. C. sec. 1345.

1. The Facts.

On October 1, 1946, the Seeley Tube and Box Company, Inc., a New Jersey corporation, filed petition in the District Court for an arrangement under Chapter XI of the Bankruptcy Act, 11 U. S. C. sec. 701, *et seq.* (R. 13). With the petition, the debtor filed a statement of executory contracts, including a number of government contracts with the Picatinny Arsenal (R. 13-14). A few days later, the United States gave notice to the debtor of its intention to

terminate two of these contracts because of the debtor's default in performance, and, on November 18 and 19, 1946, they were terminated (R. 13). The Government reserved its right to hold the debtor liable for any damages that might result from the re-letting of the contracts (R. 13).

On February 28, 1947, the debtor filed an amended plan of arrangement which provided for the payment in full of all unsecured debts (R. 5). On March 17, a referee in bankruptcy appointed George Stewart King to be distributing agent, pursuant to 11 U. S. C. sec. 737 (1), *supra*, at pgs. 2, 3, his duties thereunder being to distribute a fund of $160,193.68 to be deposited by the debtor (R. 13; 11). The National Surety Corporation gave bond in the amount of $10,000.00 for the faithful performance by King of his duties (R. 13). On March 21, 1952, the bond was reduced to $4,000.00 by court order (R. 13).

A hearing on the confirmation of the amended plan of arrangement was held by the referee on March 21, 1947. The plan contained no written provision as to the Government's claim, which was not yet liquidated (R. 14). However, during the hearing, the counsel for the debtor remarked that there might be an outstanding claim, amounting to perhaps $20,000.00, with respect to the Picatinny Arsenal contracts (R. 14). In discussion with the referee, he asserted that "the debtor company will deposit any sum of money that is represented by any claim that the Picatinny Arsenal may file in these proceedings within a time that your Honor directs them to file it" and, further, that "we have $94,000.00 available to pay them if necessary, and we represent to your Honor that there will be at all times $20,000.00 or more available to dispose of that claim, in cash" (R. 14-15). The referee then entered an order

confirming the plan of arrangement and directing King to carry it out as follows (R. 14; 11):

> "2. G. Stewarf King, as distributing agent of debtor be, and he is hereby authorized, directed and empowered to distribute the moneys deposited with him for the purpose of consummating the arrangement, by checks to be drawn and signed by the said distributing agent and countersigned by this Court in accordance with the terms of the orders of distribution to be hereafter made and entered by the Court;"

On April 14, 1947, an order was entered directing the United States of America to file its claim on or before May 9, 1947 (R. 15). On May 9, 1947, the United States of America filed its preliminary contingent proof of claim in the amount of $26,818.82. The aforesaid claim alleged that the United States of America was a priority creditor (R. 15-16).

Between March 21, 1947, the date of hearing, and May 9, 1947, the distributing agent had, in accordance with his orders received on March 21, 1947, and in accordance with orders and arrangement sheets also received by him on March 21, 1947, signed and sent to the referee for countersigning and transmittal, checks disbursing all but $6,085.01 of the money deposited with him (R. 16). Each check had been issued pursuant to a court order and was countersigned by the referee in bankruptcy (R. 16). The $6,085.01 was subsequently distributed as follows (R. 16):

United States of America	$3,620.39
Creditors having a priority to United States of America	1,057.55
Creditors not having a priority	1,407.07
	$6,085.01

On March 30, 1949, the Government amended its claim to $34,125.03 (R. 16). The referee ruled, on December 8, 1953, that the claim of the Government had been timely filed for purposes of the Bankruptcy Act, a ruling which was reversed by the District Court on review, *In re Seeley Tube and Box Company,* 120 F. Supp. 269 (D. N. J. 1954) (R. 16). On appeal, the United States Court of Appeals for the Third Circuit reinstated the referee's decision holding that:

> "The disclosure by the debtor at the referee's hearing on confirmation of the plan that the Government had become a creditor was therefor in performance of its duty under the Act and amounted to an informal amendment of the list of creditors included in the debtor's schedules." *In re Seeley Tube and Box Company,* 219 F. 2d 389, at 391 (3d Cir. 1955), cert. denied, 350 U. S. 821 (1955).

On August 2, 1956, the bankruptcy court entered an order approving King's final report and account, discharging him of his trust, and also cancelling the surety's bond (R. 17).

2. Proceedings Below.

The instant suit was brought by the United States against King and his surety company on the ground that King was subjected to personal liability by Rev. Stat. sec. 3467, 31 U. S. C. sec. 192 *supra,* p. 3, because he had failed to make payment to the Government as a priority creditor, as required by Rev. Stat. sec. 3466, 31 U. S. C. sec. 191, *supra,* p. 3. On King's death, his widow, as executrix of his estate, was substituted as party defendant (R. 12).

The District Court dismissed the Government's complaint, holding that King, as a distributing agent in bankruptcy, was not within the class of persons subjected to liability by 31 U. S. C. sec. 192, *United States* v. *King*, 208 F. Supp. 697 (D. N. J. 1962). The Court of Appeals reversed this decision by an opinion and order filed September 13, 1963 (R. 30-41), 322 F. 2d 317. On January 13, 1964 this Court granted certiorari (R. 42), 375 U. S. 983.

Summary of Argument.

Rev. Stat. sec. 3466, 31 U. S. C. sec. 191 and Rev. Stat. sec. 3467, 31 U. S. C. sec. 192, have from the earliest days been read in *pari materia*. An individual can not be held liable under sec. 192 unless he has failed to pay a debt due the United States within the meaning of sec. 191. We contend that in the case at bar sec. 191, and therefore 192, does not apply because (1) the debtor was not legally insolvent and (2) because the debtor had never manifested its insolvency in one of the three modes set forth in the statute. The courts have held that each of these two requirements must be met before the debt is one within the meaning of sec. 191.

Even assuming that the failure to meet these requirements does not prevent the application of secs. 191 and 192 to our case, the distributing agent, King, should not be held liable since he received substantially less than all of the assets of the debtor. It would be both illogical and unfair to hold a representative liable under sec. 192 when the debtor has retained substantial assets which might be used to pay the government's claim. Nor was it within the meaning of sections 191 and 192 or their predecessor stat-

utes dating back to 1797, all of which contemplated placing this liability on persons who had control of *all* of the assets of the debtor.

In any event the distributing agent in the instant case should not be held liable since he was merely an arm of the court and followed its orders explicitly. There is no case in which a receiver or a distributing agent who followed the orders of the court has been held liable under sec. 192. In the case of *United States* vs. *Crocker*, 313 F. 2nd 946 (9th Cir. 1963), the receiver acted without court authorization or approval. On those facts therefore, *United States* vs. *Crocker, Ibid,* is not in conflict with *United States* vs. *Stephens,* 208 F. 2nd 105 (5th Cir. 1953). In *Crocker* the receiver, when he ceased to follow the orders of the court, was acting on his own and not as an officer or arm of the court. In the instant case the distributing agent was acting solely as an officer or arm of the court within the meaning of those terms as defined in *United States* vs. *Stephens, supra,* and therefore, was not an "other person" who could be held liable to the United States under sec. 192.

ARGUMENT.

I.

Rev. Stat. Sec. 3466, 31 U. S. C. Sec. 191 and Rev. Stat. Sec. 3467, 31 U. S. C. Sec. 192 do not apply to the case at bar since the debtor corporation was not insolvent.

Rev. Stat. Sec. 3466, 31 U. S. C. Sec. 191, is taken almost verbatim from Section 5 of "An Act to provide more effectually for the settlement of Accounts between the United States and Receivers of Public Money". Act March 3, 1797, ch. 20, Sec. 5, 1 Stat. 515.[1]

Rev. Stat. Sec. 3467, 31 U. S. C. Sec. 192, is taken almost verbatim from a portion of Section 65 of "An Act to regulate the collection of duties on imports and tonnage" Act March 2, 1799, ch. 22, Sec. 65, 1 Stat. 676.[2]

---

[1] Section 5, Ch. 20 of Act of March 3, 1797, 1 Stat. 515, provides:

> "Section 5. And be it further enacted, That where any revenue officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed. (a)"

[2] Section 65, Ch. 22, of Act of March 2, 1799, 1 Stat. 676, provides in pertinent part:

> "Sec. 65 And be it further enacted, That where any bond for the payment of duties shall not be satisfied on the day it may become due, the collector shall, forthwith and without delay,

These statutes have from the earliest days been read in *pari materia*. *Thelusson* v. *Smith*, 2 Wheat. 396 (1817); *United States* v. *Lutz*, 295 F. 2nd 736 (5th Cir. 1961); *United States* v. *Western Union Telegraph Co.*, 50 F. 2d 102 (2d Cir. 1931).

Sec. 65 of Act of 1799, 1 Stat. 676, was interpreted to apply only where there was an insolvency in the technical sense. Mr. Justice Duval in *Prince* v. *Bartlett*, 8 Cranch 431, 434 (1814), said:

> "Insolvency must be understood to mean a legal and known insolvency manifested by some notorious act of the debtor pursuant to law—not a value allegation, which, in adjusting conflicting claims of the United States and individuals, against debtors, it would be difficult to ascertain."

Subsequent cases have established that the mere inability of a person to pay all of his debts does not give rise to a priority in favor of the United States under section 191. The government must show that the debtor's liabilities are greater than his assets. *Thelusson* v. *Smith*, *supra*; *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386, 438-439 (1828);

---

cause a prosecution to be commenced for the recovery of the money thereon by action or suit at law, in the proper court having cognizance thereof; and in all cases of insolvency, or where any estate in the hands of the executors, administrators or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, on any such bond or bonds, shall be first satisfied; and any executor, administrator, or assignees, or other person, who shall pay any debt due by the person or estate from whom, or for which, they are acting, previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in their own person and estate, for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid; * * *"

United States v. *Oklahoma*, 261 U. S. 253 (1923); *United States* v. *Press Wireless*, 187 F. 2d 294 (2d Cir. 1951); Annot., 169 A. L. R. 626 (1946).

In *United States* v. *Oklahoma, supra,* the United States had filed a bill in equity against the state which the state moved to dismiss for insufficiency. The bill alleged that the state by a statutory commissioner had taken possession of the assets of one of the state's own banks; but it did not allege that the assets were insufficient to pay the debts. The Court granted the state's motion to dismiss, saying, at p. 260:

> "Mere inability of the debtor to pay all his debts in ordinary course of business is not insolvency within the meaning of the act, but it must be manifested in one of the modes pointed out in the latter part of the statute which defines or explains the meaning of insolvency referred to in the earlier part."

In *United States* v. *Press Wireless, supra,* a case similar to the case at bar in that it involved a debtor corporation which had filed a petition under Chapter XI of the Bankruptcy Act, the court held that the United States was not entitled to priority under section 191 because there was no proof that the debtor corporation was insolvent within the meaning of the statute. The court reviewed the history of section 191, considered the effect of *United States* v. *Oklahoma, supra,* and concluded that insolvency is a *sine qua non* of the statute.

While the above cases involve Sec. 191, *United States* v. *Lutz*, 295 F. 2d. 736 (5th cir. 1961), deals directly with Sec. 192. In that case it was held that an individual would

not be liable to the United States under this section unless the debtor for whom he acted was insolvent when payments were made to creditors other than the United States.

In the case at bar there was no allegation in the complaint of the insolvency of the debtor corporation. At the hearing before the Referee in Bankruptcy on March 21, 1947, the attorney for the debtor corporation indicated that there was $94,000 left over after provision being made for the claims of the creditors except the United States of America (R. 14-15). At that time provision had been made to pay all the creditors in full (R. 5). *In Re Seeley Tube & Box Co.*, 120 F. Sup. 269, 271 (D. N. J. 1954) and *In Re Seeley Tube & Box Co.*, 219 F. 2d 389, 390 (3rd Cir. 1955). Absent the legal insolvency of the debtor corporation, neither Sec. 191, nor Sec. 192 which is interpreted in relation to Sec. 191, applies.

II.

Rev. Stat. Sec. 3466, 31 U. S. C. Sec. 191, and Rev. Stat. Sec. 3467, 31 U. S. C. Sec. 192, do not apply to the case at bar since the debtor corporation had not made an assignment of its assets, or committed an act of bankruptcy.

Again reading the two sections together, we contend that even if the lack of insolvency of the debtor corporation does not in itself prevent the statutes from applying to our case, yet the other requirements of the statutes have not been met.

In interpreting 31 U. S. C. Sec. 191, this Court has held that by appending to the phrase, "wherever any person

indebted to the United States is insolvent" a series of situations, Congress intended to confine the operation of the statute to the situations selected. First announced in *United States* v. *Hooe*, 3 *Cranch* 73, 91 (1805) and later in *Beaston* v. *Farmer's Bank*, 12 Pet. 102, 133 (1838), we find the rule again exemplified in 1923 in *United States* v. *Oklahoma*, 261 U. S. 253, 262, Mr. Justice Butler saying:

> "In order to give the priority specified in Sec. 3466 there must be a case of an insolvent debtor who makes a voluntary assignment of his property, or a case in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, or a case in which an act of bankruptcy is committed."

In *Bramwell* v. *United States Fidelity & G. Co.*, 269 U. S. 483 (1926), insolvency of a defunct bank having been conceded by the parties, the Court proceeded to determine whether there had been either a voluntary assignment of its property or the commission of an act of bankruptcy, on the theory that insolvency must be manifested in one of the three modes set forth in the statute.

None of these three modes of insolvency was manifested in the case at bar.

Our case does not involve an absconding, concealed, or absent debtor.

Nor was any act of bankruptcy committed in our case. The debtor corporation had filed a petition for an arrangement under Chapter XI of the Bankruptcy Act, 11 U. S. C. 701, *et seq.* No receiver or trustee was ever appointed. The complaint of The United States does not al-

lege that the debtor corporation committed an act of bankruptcy.

There was not any voluntary assignment of the property of the debtor. To counsel's knowledge there is no case in point on the question of whether the filing of a voluntary petition for a plan of arrangement under Chapter XI of the Bankruptcy Act constitutes an assignment of the debtor's property within the meaning of the term as used in Sec. 191. If it is deemed that there is such an assignment merely by reason of the filing of a Chapter XI proceeding, then it must necessarily be an assignment from the debtor to the Court. See *Weiss* v. *Fleetwood Bank*, 261 App. Div. 572, 26 N. Y. S. 2d 583, 586 (App. Div. 1941). If the assignment be from the debtor to the court, it is the court, not the distributing agent, who in our case was the "other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts" within the meaning of Sec. 192. On the other hand, if there was no assignment, then the requirements of Sec. 191 have not been met and therefore Sec. 192 does not apply.

We contend that there was no assignment within the meaning of Sec. 191. There was no voluntary assignment because the debtor corporation was never divested of all of its assets. The debtor corporation apparently had at least $94,000 which was not turned over for distribution, as will be discussed further in connection with Point III of this argument (R. 14-15). It has been held that there must be a transfer of all of the debtor's assets to constitute a voluntary assignment within the meaning of Sec. 191. In *United States* v. *Hooe*, 3 Cranch 73, 91 (1805), the Court, construing the meaning of the provision as to voluntary

assignment of property in the Act of March 3, 1799, ch. 20, Sec. 5, from which our Sec. 191 is derived, stated:

> "The word 'property' is unquestionably all the property which the debtor possesses; and the word 'thereof' refers to the word 'property' as used, and can only be satisfied by an assignment of all the property of the debtor. Had the legislature contemplated a partial assignment, the words 'or part thereof,' or others of similar import, would have been added."

III.

31 U. S. C. Sec. 192 does not apply to the case at bar because the distributing agent, King, never received all of the debtor corporation's assets.

Sec. 192 makes liable:

> "* * * every executor, administrator or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate * * *."

Being a penal statute, it should be strictly construed. It is significant that the statute makes the representative, not the debtor himself, personally liable. It appears that Congress contemplated a complete transfer of the debtor's assets to a third party who is in effect made a trustee for the United States and is bound to pay that debt first out of the proceeds of the debtor's property. The courts therefore have required that there be a divestment of all the debtor's property before Sec. 191 applies. *United States* v.

Hooe, 3 Cranch 73, 91 (1805); *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 438-439 (1828); *Beaston* v. *Farmers Bank*, 12 Pet. 102, 133 (1838); *Manhattan Rubber Mfg. Co.* v. *Lucey Mfg. Corp.*, 26 F. 2d 839 (D. N. Y. 1928); *Smith* v. *United States*, 113 F. Supp. 702, 707 (D. Hawaii 1953). *A fortiori* this reasoning should apply to Sec. 192. Any other interpretation would make it burdensome in the extreme for one to act in a representative capacity. Also it would be illogical to interpret this statute as making such a representative liable when the statute does not make liable the principal who retained part of the assets.

In the instant case all of the assets were not turned over to King as distributing agent. The debtor corporation apparently still had at least $94,000 in assets which were not turned over to King for distribution (R. 14-15). The debtor corporation's counsel so represented in open court (R. 14-15). The court and the government acquiesced in this withholding of assets by the corporation. Neither the court nor the government ever required the debtor corporation, Seeley Tube and Box Company, Inc., to turn over this $94,000 to the Court or to the distributing agent, King. For eleven years the government sought to satisfy its claim from this sum of $94,000 held by the corporation. The government filed its claim and litigated its claim with the debtor corporation from May 9, 1947 to February 9, 1955. Thereafter, on August 2, 1956, the government permitted the discharge of the distributing agent, and the discharge of the surety bond. No action against the distributing agent was instituted by the government until July 3, 1958. In the intervening 11 years the government was looking to the $94,000 held by the corporation, not to

the $160,193.69 deposited with the distributing agent. In 1958 after the $94,000 had apparently been exhausted by the corporation, the government turned to the distributing agent. This we submit is a far cry from the situation contemplated by Sec. 191 and Sec. 192—the situation where only one fund is available for the Government to collect from, namely that held by the transferee of all the assets of an insolvent debtor.

IV.

A distributing agent should not be held liable under Rev. Stat. Sec. 3466, 31 U. S. C. Sec. 191, and Rev. Stat. Sec. 3467, 31 U. S. C. Sec. 192, where he followed explicitly the orders of the court in his distribution.

In *United States* v. *Stephens*, 208 F. 2d 105 (5th Cir. 1953), a receiver appointed by a state court for an insolvent corporation followed schedules and orders of the court and as a result the debtor's fund had been exhausted by paying other creditors in advance of satisfying priority claims due to the United States The United States commenced suit under Rev. Stat. Sec. 3467, 31 U. S. C. Sec. 192, to hold the receiver personally liable for the debt, but the District Court dismissed the complaint on the ground that Sec. 192 is not applicable to court appointed receivers, *United States* v. *Stephens* (not reported). The dismissal of the complaint was affirmed on appeal, *United States* v. *Stephens*, 208 F. 2d 105 (5th Cir. 1953). The Court of Appeals pointed out that Sec. 192 does not specifically refer to a receiver in its enumeration of certain fiduciaries by title and construed the words "or other person" as being

"* * * limited to those who stand as personal representatives not only by the application of the principle of *ejusdem generis* but by the language qualifying 'person' as one 'who pays in whole or in part any *debt due by the person or estate for whom or for which he acts'.*" *United States* v. *Stephens*, Id., at p. 108. (Emphasis in original). The court asserted that the defendant as a receiver was an officer or arm of the court acting for the court rather than for the debtor. It concluded that the defendant was not within the purview of Sec. 192, and that the suit was properly dismissed.

There is no case which has come to counsel's attention in which a receiver or distributing agent who followed explicitly the orders of the Court has been held individually liable under Sec. 192. There is one case, the case of *United States* v. *Crocker*, 313 F. 2d 946 (9th Cir. 1963), where a receiver acting without court authorization or approval was held liable. The fact that the receiver in *Crocker* was acting without the approval of the court is specifically referred to in the lower court's opinion, *United States* v. *Crocker*, 194 F. Supp. 860, 861 (D. Nev. 1961). Thus the holding in *United States* v. *Crocker* is really no more than a case in line with the holding in *In Re J. B. Pollack Co., Inc.*, 86 F. 2d 99 (2d Cir. 1936), where a distributing agent was held liable to creditors when payments were made without proper order, resulting in a depletion of the fund so that creditors' claims could not be satisfied. The court in both those cases held the individual liable because he was no longer acting as an agent of the court but was, on his own initiative, taking on a responsibility and acting in the same manner as might an "executor, administrator

or assignee." He was not acting strictly as an arm of the court.

In *United States* v. *Sachs*, 217 F. Supp. 545 (D. Md. 1963), a receiver was also held liable for disregarding the right of priority of the government in distributing the assets of an insolvent corporation. The opinion does not state whether the court ordered this distribution, whether the receiver disregarded a contrary order, or whether no order was made. It would seem probable from the court's language and from the fact that a proof of claim had been filed by the government prior to any distribution, that the distribution was either made without an order of court or in contravention of such order.

The distributing agent in the case at bar was appointed by the court concurrently with the deposit by the debtor corporation of a sum sufficient to consummate its plan of arrangement with unsecured creditors. Since the debtor had remained in possession, some functionary was necessary to act as the arm of the court in the preparation of the necessary dividend checks as directed by the court. The defendant, King, was not directed to inquire into the affairs of the debtor to determine what priority claims existed nor was any provision made to compensate him for so doing. He was appointed to act as an arm of the court in carrying out the provisions of 11 U. S. C. Sec. 737. He was ordered to perform the following duty (R. 11):

> "• • • the said distributing agent being hereby directed on receipt of such consideration to deposit said funds in an account to be opened in any qualified bankruptcy depository in this district, subject to the control and order of this Court."

Thereafter, upon confirmation, he was further ordered as follows (R. 11):

> "G. Stewart King, as distributing agent of debtor be and he is hereby authorized, directed and empowered to distribute the moneys deposited with him for the purpose of consummating the arrangement, by checks to be drawn and signed by the said distributing agent and countersigned by this Court in accordance with the terms of the orders of distribution to be hereafter made and entered by the Court."

Subsequently, orders for the distribution were made by the court giving the name of each person to whom distribution was to be made together with the amount of such distribution.

Thus the distributing agent's function was purely a ministerial one. His sole discretion was in the selection of a "qualified bankruptcy depository in this district". It cannot be denied that in the instant case the defendant, King, faithfully carried out the order of the court. It is a matter of record that the defendant accounted to the court and was discharged of his trust (R. 17). In fact, the charge directed at the defendant, King, is that he did carry out the orders of the court and that his obedience to these orders renders him liable to the United States of America.[3]

---

[3] The court below did say (R. 39):

> "* * * Negligence is apparent in the situation at bar. Moreover, in the case at bar it should be noted that King was not only the distributing agent but that prior to the Chapter XI proceeding, King was the president of the debtor corporation and well knew or should have known of the unresolved claim of the United States. Indeed, as we have pointed out at an earlier point in this opinion, Seeley's counsel stated that there would be available at all times $20,000 or more to dispose of the [fol. 42]

The law is clear that a ministerial officer may not act in any manner other than in compliance with the orders of the court. *Stearns, Suretyship*, Sec. 9.27, p. 341 (5th Ed. 1951). The failure of such a representative to pay out funds as directed by the court may render him in contempt and also make him personally liable to those entitled to share in the funds. 9 *Remington, Bankruptcy Law*, Sec. 3598, p. 238 (6th Ed. 1955). The rule applies to a special commissioner and to a receiver. 9 *Appleman Insurance Law and Practice*, Sec. 5445, p. 297, and Sec. 5479, p. 376 (1943). The same rule applies to a distributing agent. *In Re Empire Shoe Corporation*, 16 F. Supp. 713 (D. N. Y. 1936). In the case of *In Re Empire Shoe Corporation, Ibid*, the court held that a depository acting as distributing agent was absolutely entitled to rely on certified copy of schedules furnished by the referee and that a priority creditor who was overlooked by those schedules should not be allowed to recover against the distributing agent. The court said at page 715:

> "It would be unfair to hold it [the distributing agent] financially responsible for mistakes of others."

---

claim of the United States 'in cash.' Putting it plainly, we do not think that the equities here weigh very heavily in favor of King."

We contend these conclusions of negligence or lack of equity in Mr. King's favor are unjustified. The only evidence presented is that the debtor corporation had $94,000.00 in its possession in addition to the $160,193.69 deposited with the distributing agent (R. 14-15). Mr. King was undoubtedly relying on that $94,000.00 to pay the contingent claim of the United States of America. That the money was not there in 1958 offers no basis to infer negligence or misfeasance on the part of Mr. King as distributing agent in 1947. The government made no attempt to establish negligence or misfeasance though Mr. Freeman, who made the representation as to the retention of the $20,000, was available for examination. He also is now deceased.

Mr. King was acting under strict and binding orders which gave him no freedom of action and absolutely no discretion except perhaps the choice of which bank to use to deposit money in. His title, distributing agent, in itself implies a complete lack of power to act on his own. He was in no sense a distributing or paying person such as is implied in Sec. 192 by the words "any other person". The person who distributed or paid in the case at bar was the court itself. Mr. King should no more be charged with responsibility here for the government's loss than should the Private in the Army for the loss of a battle when he has done precisely what he was told.

Conclusion.

The judgment of the Court of Appeals should be reversed and the decision of the District Court affirmed.

Respectfully submitted,

David S. Bate,
Attorney for Petitioner,
Elizabeth Simonson King,
31 Park Street,
Montclair, New Jersey.

Paul A. Murphy,
Attorney for Petitioner,
National Surety Corp.,
1180 Raymond Boulevard,
Newark 2, New Jersey.

Of Counsel:
Boyd, Dodd, Keer and Booth,
Crummy, Gibbons and O'Neill.

Date: August 12, 1964.